Lambert (J)

MEDICAL EXPERT WITNESSES.

READ BEFORE THE

UNION MEDICAL ASSOCIATION

OF

BERKSHIRE, BENNINGTON, RENSSELAER AND WASHINGTON COUNTIES,

AT HOOSICK FALLS, N. Y., OCT. 12, 1881,

BY

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SALEM, WASHINGTON CO., N. Y.,

RETIRING PRESIDENT.

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(Read before the first named Society Oct. 12, 1881; published by request of same.)

GENTLEMEN—In fulfilling my functions as your retiring president, I have selected for the subject of remark at this time, "Medical Expert Witnesses."

It is, doubtless, a subject familiar to many of you, and it is one of such note, growing interest and importance to the medical profession, that I wish to emphasize it here to-day, and offer such matters of practical value as I may be able, in so brief and elementary a paper, for the consideration of those who have given comparatively little attention to it, or who may have had no experience at court as medical witnesses.

From an early date in history medical men, as such, have been made useful in judicial investigations but medical expert testimony was not recognized as a specialty until Charles Vth, emperor of Germany, ordained "that the opinion of medical men should be formally taken in any case where death was occasioned by violent means."

Since that time physicians have become increasingly necessary at court. The cases are greatly multiplied where the opinions of

medical scientists are required; and these cases include a wide range of topics, and demand from our profession an amount of varied and accurate knowledge of medicine and the cognate sciences, not heretofore deemed necessary.

We shall further appreciate the importance of our subject, and of having it well in hand, when we recall the fact that, whether we will or not, we may be called into court at any time, to give evidence on some of the multitudinous questions concerned in the transfer of property by will or otherwise; on questions regarding the complex subject of insanity; on the causes and methods of death, and so on; upon a great variety of matters, including the specialties; and, in fact, the professional routine of any day may furnish a reason for our being called to testify at court. No class of citizens are so frequently called upon to give evidence in courts, as are the members of our profession; but it would seem that, as a profession, we have not come to realize fully the responsibilities devolving upon us in these relations.

We may be properly reminded here that our bearings, professional attainments and capacity to sustain ourselves as experts in the trying ordeal to which we are exposed in open court, under the whip and spur of opposing counsel, subject us to the close observation, review and sharp criticism of court and lawyers, and often, of a large, attentive and scrutinizing audience, with keen-scented, irresponsible newspaper men, ever on the alert, to herald, with stenographic and lightning speed, all the scenes of the court-room, to an impatient and exacting public, composed both of professional men and the laity, always too ready to join in the general and chronic outcry against medical experts. Notwithstanding the difficulties that embarrass our situation as expert witnesses, we are bound, as good citizens and promoters of the public welfare, and as members of a noble profession, to be prepared, with a just self-respect, to meet every reasonable question, intelligently, fairly and disinterestedly.

The court and jury *cannot* wisely and justly decide many of the cases that come before them, unaided by the evidence of medical men, and the time is far distant when they will be able

to do so. As long as men have bodies and minds capable of, and disposed to abnormal action, so long will the medical man be needed at court, and until the golden rule comes to obtain universally, as a controlling motive in men's actions, he will of necessity occupy an influential and prominent place in judicial investigations.

The labors and responsibilities demanded of a skilled and scientific expert, in the medical profession, are often great, and not second in importance to those imposed upon the learned court and counsel; and a wide field of learning, science and practical acquirements, are not unfrequently needed for the solution of questions arising in a single case.

Let us now look a little more closely into our subject:

An ordinary witness testifies to facts within his personal knowledge and observation, and the jury derive from his evidence such deductions and conclusions as seem to them pertinent. This witness may offer in evidence only such matters as are readily understood by the court and jury. It is competent for him to testify, for example, that A killed B; because he saw A point a gun at B; he heard the report of the gun and saw B fall and die with a pierced body; and he reasons, and the jury will agree with him, that, as a matter of fact, A did commit a homicide, although he could not say that he saw the ball pass from A's gun to B's body. This witness cannot go further and testify that the killing was excusable, on the ground that A was insane hereditarily, or from some certain disease of the brain; he is not qualified so to testify.

In the case of the expert witness, however, it is quite different; since he is expected to be *expertus*, skilled by study and experience in the special trade—profession or science—of which he is an acknowledged master.

He is often required to state clearly, not only the general laws and technique of his specialty relevant to the case in hand, but also such abstruse matters as may be necessary, and he is also to interpret and apply the significance of these in such a manner as successfully to aid the court and jury in arriving at a just verdict. His knowledge and reasoning (not theories, for these

have no standing as evidence,) are outside the sphere of the court and jury; are the result of special study, training and experience, and may be recondite and difficult of attainment even to the specialist. What would be absolute, demonstrated fact to his educated senses, would be totally unintelligible to the man untrained in this direction He must needs interpret the facts proven or assumed at court, just as one must Anglicize a German's testimony in an English court. He must be thoroughly informed regarding the matters upon which he is examined, though it is not necessary that he fully understand all the details of his specialty. Thus, a microscopist may be a competent witness as to blood-stains, but incompetent on the subject of chrystallography. A chemist gives positive evidence as to finding poison in a stomach and other viscera; but he may decline to answer questions on symptomatology or treatment; and an ordinary practitioner will wisely decline to answer doubtful or hypothetical questions, though he may be the best possible witness in practical matters.

Under no pressure whatever, should a medical expert allow himself to be driven from his legitimate position on the witness stand, and it is fair to presume that no intelligent court will compel him to occupy a false one.

In cases where the courts have not the requsite time or ability to investigate or master a medical subject at issue, the opinion of a qualified medical expert is, sometimes, from necessity, received as conclusive.

An expert may consult authorities for the purpose of refreshing his memory, but he cannot offer them as independent proof, and he should be cautious in the use of them, even by permission of the court, as they are frequently used to his disadvantage by astute counsel. Medical books are almost sure to prove either too much or too little in court, as it is quite impossible for the laity fully to understand their nomenclature or their significance in matters of important technical application. A medical witness should be careful in answering, whether or not he agrees with a given standard authority quoted, until he knows that the quotation is correctly made, and from what edition of

the book it is taken, otherwise he may find himself seriously misled. (I was once asked on a murder trial to state the smallest fatal dose of arsenic, and replied, "from two to three grains." I was interrogated as to authorities and confronted with a quotation stating the smallest fatal dose of arsenic to be from 20 to 30 grains. I answered, "If your authority so states, it is incorrect, and is, doubtless, a misprint," as proved to be the case in an old edition of the work.") Like all witnesses, the medical expert is not required to answer any question or produce any document that will incriminate himself; and of this matter he alone is to be the judge. In New York, he cannot "disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." (A very delicate medico-legal and ethical question may arise, where an attending or consulting physician has reason to believe or know that a crime is being committed by the patient, his attendants or physicians, or where he may know that the physical or moral welfare of others ought to be protected; great wisdom, prudence, and sometimes decision is needed in such cases.) It is proper for a medical witness to be guided, in a measure, on the stand, by the statements of his patients, made to him prior to and independently of the action at law, and by leave of court, he may explain how he has arrived at a given opinion.

Medicine is a tentative and not an exact science, and it cannot always and readily be reduced to the categorical requirements of the too often over-zealous lawyer, and a medical expert witness, especially, will not generally be required to answer yes or no, when, in his opinion, either reply will not convey the truth sought. It is not unfrequently the case, that a medical expert cannot give substantial facts, or a logical reason for his opinion expressed, and yet his opinion may represent the facts in the case as certainly as if he were able to demonstrate them to the senses of the court and jury. If he is intelligently sure of his premises, and that he apprehends the facts beyond a doubt in his mind, he should hold his position impartially

and tenaciously. Very much of all testimony is matter of opinion, and to decide just what is fact and what opinion, is not always a question of easy solution.

An alienist may reasonably know, in his own mind, that a person on trial is insane and irresponsible; but he cannot always, indeed, frequently, cannot satisfactorily, demonstrate the correctness of his opinion.

A most difficult form of question is often put to an expert, *i. e.*, the cumulative question, embracing several clauses, each clause being so worded as to imply a positive or negative meaning—and the whole question is so framed as to embarrass or mislead the witness in his answer. The witness may properly seek to understand such a question fully, before answering it.

An expert witness, in particular, should be careful to answer questions audibly and in the most direct manner possible; but he should not answer until he understands the question, and has fully considered it; where this is necessary, he may need to refresh his memory, and ask for further time. He should endeavor to maintain a cool, well-poised presence on the stand, and he can hardly make a greater mistake than to allow himself to be irritated by his examiner, even though closely pressed to the wall. The counsel are permitted a wide latitude by the courts, and the safety of the witness lies in holding a strong position; he is at positive disadvantage in the open field. It is seldom wise for him to volunteer information, or enter into a discussion with the lawyers. The attorney calling him, and the court, will almost always afford him reasonable protection; but he must keep constantly in mind that he is put upon the stand to answer questions, of the relevancy of which he is not to be the judge, unless when he knows that an actual mistake or injustice is being committed, in which case it is proper for him to bring the matter respectfully to the notice of the court.

There may be occasions where a witness may prudently protect himself, when unduly annoyed by an inconsiderate questioner, and if he can, he may deal a telling rejoinder to his tormentor. (Taylor mentions a case where the witness, a distinguished medical gentleman, being addressed by the advo-

cate in a loud and offensive tone, appealed to the court, and said, "My lord, I am very excitable, and if the gentleman has a right to roar at me, I consider that I have a right to roar too." The court expressed the hope that he would not find it necessary to roar, and intimated, after a short trial of vocal strength between the opponents, that the counsel's manner towards the witness was not what it ought to be. * * * I was once urged to give a positive answer—where this was impossible in the case—when the lawyer, whose witness I was, so far forgot himself as savagely to ask—"if the witness has sufficient brains to comprehend and answer that question, (putting it.) I quietly turned to the presiding judge and replied, "with no disrespect to the court, I think I must answer, I have not brains either to comprehend or answer such a question.") A self-respecting, honest and intelligent witness may justly feel that he is a peer at court, notwithstanding the peculiar disadvantage at which he is sometimes placed. He is on the stand to tell what he knows, and nothing more.

An expert witness of doubtful qualifications or intentions cannot complain if he is badgered and brought to humiliating grief. Few shams can succeed in sustaining themselves on an average cross-examination. A pliant medical expert may, occasionally, match the counsel verbally on his own ground, but the court and jury will differentiate in his case with almost unerring certainty.

It is well to keep in mind that, on the direct examination, the questions are usually such as not to suggest the answer, only as it legitimately comes in the narrative; when, however, the witness manifests an evasive disposition, or discovers that he is a prejudiced or interested witness, then he is justly treated as an enemy in the case, and is mercilessly probed and exposed to the contempt of the court and audience. In the cross-examination, the question often suggests the answer desired in the strongest form permissible, and a due regard to truth and justice demands especial circumspection on the part of the witness. The environments of a medical expert, under the cross-examination of a skilful and audacious interrogator, are sometimes perilous in the

extreme, since the examiner has not unfrequently made himself, for the time being, the more intelligent in the facts and technicalities of the topics under review. Every one readily understands how much easier it is to ask than answer questions. (I knew of one of the ablest specialists in this country, with a world-wide reputation, being so worried by the lawyers, that when asked if he knew anything, promptly replied, "yes, certainly. I know that I will be glad to leave this stand," which he soon did in perfect discomfiture.) A straightforward and well balanced witness, intent only on giving the facts, has generally little to fear from the heaviest batteries of any lawyer. (I was engaged in a case many years since, when the late Judge Clifford strove unsuccessfully, for nine consecutive hours, to break down the testimony of an honest little Irish girl, 13 years of age. She simply adhered to the truth, and this was fatal to the judge's client.) A witness has the privilege of correcting his answer, if he finds that he has been misled or misunderstood, and he can do this, by permission of court, at any time before the evidence is closed. A medical expert should always avoid the use of technical terms when possible, as these are not generally understood, and usually confuse rather than enlighten those concerned in the trial. It is much better for a witness frankly to acknowledge that he cannot answer a certain question, than make a fool of himself by attempting an impossibility. But I cannot dwell upon this branch of the subject.

It has come to be an acknowledged fact that medical experts, in particular, are looked upon with suspicion by the courts and the public; true and false experts sharing alike in this disregard. This is especially to be deprecated, since the attitude of the medical expert, in a peculiar manner, should be that of *amicus curiæ*, a trusted and impartial assistant to the court, and an indiscriminating friend of the accused. * * * * Though the best abused of witnesses, as he sometimes may have reason to feel himself to be, he is bound, nevertheless, to compel that considerate recognition to which he is justly entitled, and he will seek to grant no more nor less to the exactions of counsel, than is endorsed by his own high sense of honor and responsibility to

truth and justice. * * * * But not every intelligent and truthful man has the ability or mettle thus to sustain himself easily upon the stand, and we too often forget that no more can reasonably be expected of us at court, than we should be prepared to answer to our own conscience, at the bedside of our patient, or in the discharge of any professional duty.

Too little thought, attention and preparation, have been bestowed upon medico-legal matters, by the profession and medical colleges. No medical school should be sustained by the profession, that does not include in its curriculum, a full course on medico-legal jurisprudence. * * * Formerly, only representative men of known and unquestioned ability, were called as expert witnesses. They were generally received as reliable exponents of medical science. They spoke *ex-cathedra*, and, indeed, so positive was their influence at court, that their opinions often virtually decided the case at issue, and not unfrequently, one unchallenged medical expert was deemed, and was, sufficient authority on all matters then known to the profession.

Now, however, it is by common consent conceded, that medical experts as often hinder as forward in the administration of justice, and a Babel confusion of conflicting opinions often embarrasses the adjudicating tribunal.

In the time which I may occupy, I can do little more than call attention to some of the more prominent causes existing, and producing this state of affairs, and I select them almost at random.

The art and science of medicine and surgery have advanced *pari passu* with the other sciences and arts; and, indeed, we may say, with just pride, that in no other department of human learning, have there been more fruitful results for the welfare of the race than we find to be true in medicine.

It has come to pass, however, that medicine has been divided and subdivided into specialties, and ambitious men have crowded themselves into notice, as too willing and partisan witnesses. They zealously espouse whichever side offers them a retainer, and their alacrity is proportionate to the amount of the fee, their

opportunity for notoriety, or breaking a lance with a rival in forensic medicine. The retainer is usually made to correspond with the acquired reputation of the expert, or the exigencies of the attorney calling him; and Lilliputian pretenders, with large fees to bolster a bad case, are by no means an anomaly at court.

Such men are *ex-parte*, and not *expertus* witnesses. Some one has said: "Medical testimony to almost any effect can be purchased in the market as readily as one may purchase a horse, and, to extend the simile, with as little assurance of soundness." While this is conceded as almost literally true in reference to a class of experts, I am very sure it does not apply to a vast majority of medical gentlemen.

A medical expert without a bias is not merchantable; his business at court, his *raison d' etat*, is not only to give evidence but to assist the counsel in planning and securing a just verdict. The false expert is more solicitous for a personal and partisan victory than for a righteous judgment. They are medical shysters, worthy of the utmost contempt, and should be squarely tabooed by the profession. I shame to say it—it would not be difficult to notice examples in the courts of these tradesmen, eminent in reputation, who have grown opulent, as it is believed, by telling lawyers how to do it and how not, and through whose testimony (not evidence) not a few murderous scoundrels walk the earth, free of their just deserts. These witnesses often discover equal skill and adroitness upon their direct, cross and re-direct examinations, to that shown by the learned counsel. They cover and uncover professional facts and deductions to suit their purpose; and, sometimes, they are being dependent upon the results of the case, they are not only false witnesses, but interested and virtually perjured parties, and this, without fear of the legal consequences of perjury, for the reason that it is impossible to convict them of swearing falsely to an opinion. "Smaller fry" of the same class, coached for the purpose, and men of ability, but not of integrity, and simply from a love of mischief, sometimes, are found available by counsel. A medical expert is usually sought, interviewed and

employed, because his views promise to sustain a given side of the case: and hence, otherwise honorable gentlemen, not unfrequently find themselves, almost by force of circumstances, and manipulation of advocates, diametrically, zealously and tenaciously opposed to each other upon the witness stand, much to the confusion and detriment of justice, and the prejudice of the profession. In such cases there can be no just cause of complaint, if the testimony is received with extreme caution, or is excluded altogether; the court thinking it safest and best to trust the case to the unlearned common sense of the jurors. Pride of opinion is not, without reason, charged as a besetting sin of our profession.

The courts do not undertake to decide between the different schools of medicine in the matter of expert evidence, but they require that the witness give evidence of possessing competent knowledge of the particular topics upon which he is examined, and they allow quite a free license to the counsel in testing his professional capacities; his evidence must stand or fall on its own merits.

As to the matter of compensation for medical testimony, the general theory of the courts would seem to be, that a physician must respond to an ordinary subpœna, and answer questions of fact in the same manner as a common witness, and receive only the same meag e pittance. He is not asked to prepare for the case by special study, or other work, without special recompense, nor will the court require him to examine, in a professional way, any person or matter during the trial without remuneration. The general practice of the courts, however, is, "that the law does not require a medical witness to give in evidence, *his opinion as an expert*, without compensation, as for professional service"; holding, and I think justly, that his knowledge is the result of special study and preparation; of a large outlay in time and money; is his capital, means of livelihood, and not to be exacted of him by private individuals or the state without reasonable pecuniary return.

In some instances, and, I think, not unfrequently in New York, the judges recognize the value of an expert's testimony

and time, and order, in the exercise of their discretion, the expert to be fairly paid for services rendered before and during trial in criminal cases, or when he is called by the people. In other instances, where the services of an expert are deemed necessary to the prosecuting officer, he virtually audits the expert's bill and it is paid by the authorities. In Massachusetts it has become the practice, as I am informed, to place the value of the services of the expert at $50 per day. This amount is frequently allowed in New York. One of the leading experts in Vermont informs me that it is the practice of experts in that state to agree with the authorities in advance as to the matter of compensation, before going into court.

It has been a mooted question how best to secure and develop medical expert evidence, so as to make it of the highest value and utility. Much and varied learning and experience have been expended in the direction in this country and Europe by both the legal and medical professions; but whatever the improvements made in medico-legal codes or practice, the fact will still remain that the medical man is and must continue to be the master of the situation: upon him will depend in greatest measure the ability of the courts to obtain from him an intelligent, unbiased and valuable solution of every question necessarily submitted to him. However perfect the system that may be adopted regarding expert evidence, incompetent and partisan medical experts will be put upon the stand as phantom witnesses by lawyers intent only on carrying out their own purposes.

In my judgment the remedy for existing evils in this country does not lie so much in discussing and amending a presumably defective medical jurisprudence (necessary as this may be), as in the cultivation of a higher standard of medico-legal attainments and ethics by the respective professions. The leading men in both professions are able and honorable, and if they shall unite more fully and cordially in developing a juster comprehension of what is mutually needful, they will soon be enabled to secure much more certainly all attainable expert evidence in almost every case, and thus will remove very much

of the not unmerited criticism on the conduct of many court proceedings. * * * The legal profession and medical scientist are alike interested in this matter, and should co-operate in bringing their respective studies and efforts to bear upon its practical issues.

From a medical standpoint, I would urge, with especial emphasis, perhaps, that the courts may wisely check the practice of granting too much latitude in the cross-examination of medical experts. When the witness has evidently told all he knows regarding the case, and has done it honestly, nothing can be gained to justice by permitting the achievement (?) of "showing the doctor up." The court may properly remember, I think, that the physician is also a member of a liberal profession, and that hence something of reciprocal courtesy is due him.

Forensic medicine, as a specialty, claims attention at our hands, and it is a department that will furnish ample material for the exercise of the best minds in our profession. * * * The subject appeals especially to the capable young men of our profession, and I confidently expect that the many promising young gentlemen of this society will furnish to our large community examples of skilful experts in the different departments of medical science, whose presence in court will command unquestioned attention and respect. * * * Those of us who have been at court as witnesses are, doubtless, forcibly reminded of the necessity of giving the subject closer thought and more careful study.

I take pleasure in announcing to you, gentlemen, that initiatory steps are being taken for the formation of a medico-legal society within the territorial limits of this association. Such a society, embracing, as it will when formed, distinguished members of both professions, from portions of three such states as are Massachusetts, Vermont and New York, cannot fail to do a good work, and accomplish much for the welfare and safety of the social fabric.

A very considerable proportion of the evidence required of medical men is called in connection with criminal cases; and

I desire to refer briefly to the relations of our profession to that part of criminal justice (?) known as the coroner's inquest.

Massachusetts had the good sense, in 1877, to abolish the office of coroner and to provide for medical examinations and inquests by competent medical examiners in cases of death by violence. The law abolishes the office of coroner not only, but it also dispenses with the services of the coroner's jury as unnecessary and supererogatory. It provides that the medical examiner take charge of the medical part of the investigation, and that the proper legal officer shall conduct the legal and executive aspects of the case.

The medical examiner is selected for the office, because of his fitness to discharge the duties incumbent upon him; and he is to command the services of such further expert skill as any given case may require.

Under such a system, with such a division of educated labor from the legal and medical professions, and with such advancement as is being made in medico-legal science, we may hope that, in a short time, there will be very few deaths unaccounted for.

In my judgment, a long step in the right direction has been taken by Massachusetts, and I have no doubt other states will soon follow with similar enactments, when it is seen how the new system works, and what are its defects, if any are found to exist.

Any medical man, at all familiar with the prevailing transactions of coroner's inquests, must frequently recognized the exceedingly unsatisfactory results, when viewed from a medical standpoint.

A dead body is found, and, perhaps, it is not identified. The mode of death is not easily understood, but a crime is presumed in connection with the death. The nearest physicians are summoned, good and intelligent men as general practitioners or surgeons, but perfectly helpless, not infrequently, to fathom some of the mysteries that lie concealed before them in the mute, lifeless form. A capable physician is always prepared to investigate and give a satisfactory solution of very many of the

questions which arise at coroner's inquests, but the busy practitioner cannot possibly find time to keep well up in all the scientific departments that may be necessary to qualify him to say with assuring certainty, in almost every case, what is the cause of death, and thus materially to aid in forwarding the ends of justice. * * * I think that nothing is ventured by saying that very many respectable physicians have given so little attention to forensic medicine, that their opinions at a coroner's inquest are often of little, if any, more value than that of other intelligent non-professional men. They do not know, in obscure cases, what to look for, where to look, and would not recognize the vital facts when present.

I can only urge that it is highly important that every medical man make himself reasonably intelligent in these matters ; that he qualify himself, as best he may be able, to meet the responsibilities that may devolve upon him at any hour.

I would especially suggest that he take specific and close notice of everything essential at an inquest ; that he make and keep accurate notes of every material point, and that he preserve or cause to be preserved in a legal manner, everything possible that may be necessary as evidence.

It is for want of due attention to these matters that the courts are, sometimes, unable to convict parties, who are by common consent known to be guilty. The evidence has not been properly collected in the onset and carefully preserved. The duty of the medical man is to appreciate and secure the medical facts ; and upon the legal profession devolves the responsibility of recognizing, apprehending, and punishing the guilty criminal. No sensible medical man, having had professional relations to a coroner's inquest, will fail to fully inform himself, as far as possible, upon all matters likely to come up in connection with a subsequent trial at court.

I cannot close, gentlemen, without expressing to you my sincere thanks for the courteous consideration, which you have shown me, while it has been my honor and privilege to preside at our exceedingly pleasant and profitable sessions during the year.